

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRIAN J. STRETCH
United States Attorney
Northern District of California

JAMES G. TOUHEY, JR.
Director, Torts Branch, Civil Division
United States Department of Justice

STEPHEN E. HANDLER
Senior Trial Counsel, Torts Branch, Civil Division
United States Department of Justice

PHILIP D. MACWILLIAMS
Trial Attorney, Torts Branch, Civil Division
United States Department of Justice

Attorneys for Defendant United States

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

KEVIN GALLAGHER, on behalf of himself; and DONOR NO. 1, individually and on behalf of all anonymous donors to Free Barrett Brown,) C 17-0586 MEJ
Plaintiffs,) DEFENDANT UNITED STATES' MOTION TO
) SUBSTITUTE; [PROPOSED] ORDER
v.) Date: August 20, 2017
) Time: 10:00 a.m.
UNITED STATES; CANDINA HEATH;) Judge: Maria-Elena James
ROBERT SMITH; DOES 1-10,) Courtroom B, 15 th Floor,
Defendants.) 450 Golden Gate Ave., San Francisco, CA

**NOTICE OF MOTION AND MOTION TO SUBSTITUTE THE UNITED STATES FOR THE
INDIVIDUAL DEFENDANTS IN THE THIRD CAUSE OF ACTION**

PLEASE TAKE NOTICE THAT on August 20, 2017, at 10:00 a.m., before the Honorable
Maria-Elena James, Courtroom B, 15th Floor, 450 Golden Gate Avenue, San Francisco, California,
94102, Defendant United States will and hereby does move this Court for an order substituting the

United States of America for the defendants Candina Heath and Robert Smith with respect to the third claim for relief (Count III) of the Complaint (Dkt. # 1). This motion is supported by the certification of James G. Touhey, Jr., Director, Torts Branch, United States Department of Justice (attached as Exhibit A) and the accompanying points and authorities below. The United States has attached a proposed Order for the convenience of the Court.

INTRODUCTION

This action arises out of the service of a subpoena on WePay, Inc. (the “WePay subpoena”), the host of a crowd-funded legal defense fund for Barrett Brown, seeking information related to said fund. Compl. ¶ 3. The subpoena was issued by Candina Heath, Assistant United States Attorney for the Northern District of Texas, and directed WePay to provide the information relating to the fund to Special Agent Robert Smith of the Dallas office of Federal Bureau of Investigation (“FBI”). Compl. ¶ 3, 14, 15. The fund was created by Kevin Gallagher, a plaintiff in this action, for the defense of Mr. Brown, who was facing felony charges for various Federal crimes. Compl. ¶¶ 22-25.¹ Donor No. 1, also a plaintiff in this action, alleges that he donated money to this fund. Compl. ¶¶ 11, 25. The Complaint alleges that the donors to this fund had a right to remain anonymous. Soon after the fundraising began, the WePay subpoena was issued. Compl. ¶ 27. The WePay subpoena stated that its purpose was related to Mr. Brown’s criminal prosecution, but, the Complaint alleges, was really an effort to “identify and surveil Mr. Brown’s financial supporters.” Compl. ¶ 27, 31.

The Complaint asserts three claims for relief. In the first claim, Donor No. 1, on behalf of himself and a putative class, seeks relief against Defendants Heath and Smith for alleged violations of their First Amendment right to speak and associate anonymously. Compl. ¶¶ 41-44. In the second claim, Kevin Gallagher and Donor No. 1, on behalf of himself and the putative class, seek relief against Defendant United States for alleged violations of the Stored Communications Act (“SCA”), 18 U.S.C. §

¹ The charges against Mr. Brown were filed in the United States District Court for the Northern District of Texas. *United States v. Brown*, No. 3:12-cr-317 (N.D. Tex.); *United States v. Brown*, No. 3:12-cr-413 (N.D. Tex.); *United States v. Brown*, No. 3:13-cr-00030 (N.D. Tex.).

2703(a). Compl. ¶¶ 45-55. In the third claim, Donor No. 1, on behalf of himself and a subclass of the putative class, seeks relief against Defendant United States and Defendants Heath and Smith for alleged violations of the right to privacy under the California Constitution. Compl. ¶¶ 56-60.

ARGUMENT

Count III seeks damages for alleged violations of California law. However, the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified in part at 28 U.S.C. §§ 2671, 2674, 2679) (hereinafter the “Westfall Act”), provides that a claim against the United States under the Federal Tort Claims Act is the exclusive remedy for persons seeking recovery of damages for any “negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.” 28 U.S.C. §2679(b)(1). The Westfall Act provides that all other “civil action[s] or proceeding[s] . . . against the employee or the employee’s estate [are] precluded without regard to when the act or omission occurred.” *Id.* The above-named defendants were acting within the scope of their employment with respect to the conduct alleged in Count III, and the Westfall Act allows no exception for the tort claims alleged therein. Thus, Plaintiffs’ sole remedy, if any, is against the United States. Accordingly, the United States should be substituted in their place pursuant to 28 U.S.C. §2679(d)(1), and the individual defendants should be dismissed from Count III.

I. THE WESTFALL ACT CERTIFICATION PROCESS

The Westfall Act authorizes the Attorney General to certify that a United States employee was acting within the scope of his employment at the time of an incident giving rise to a civil claim. See 28 U.S.C. § 2679(d)(1) and (2). The Attorney General has delegated the authority to certify scope of employment to any Director of the Torts Branch, Civil Division. See 28 C.F.R. § 15.4(a). James G. Touhey, Jr., a Torts Branch Director, has certified that Count III is based upon actions taken by the individuals in the scope of their federal employment. See Exhibit A. Consistent with this certification and the arguments set forth herein, the United States should be substituted in place of the individuals with respect to Count III. “The Attorney General’s decision regarding scope of employment certification [under the Westfall Act] is conclusive unless challenged.” *Green v. Hall*, 8 F.3d 695, 698

(9th Cir. 1993) (per curiam) (citation and footnote omitted); *U-Haul Intern., Inc. v. Estate of Albright*, 626 F.3d 498, 501 (9th Cir. 2010). If challenged, this certification is entitled to prima facie effect that the defendants acted within the scope of their employment. *See Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995) (citation omitted). The burden then shifts to the plaintiff to prove by a preponderance of the evidence that the defendants acted outside the scope of their employment. *See id.* After certification, the action “shall be deemed an action against the United States [under the FTCA] and the United States shall be substituted as the party defendant.” *United States v. Smith*, 499 U.S. 160, 164 n. 5 (1991) (brackets in original) (quoting 28 U.S.C. § 2679(d)(2)). Once the United States is substituted, the suit is to “proceed in the same manner as any action against the United States filed pursuant to section 1346(b) . . . and shall be subject to the limitations and exceptions applicable” to actions under the FTCA. 28 U.S.C. § 2679(d)(4). The Westfall Act provides only two exceptions to the rule that the FTCA is the exclusive remedy for claims against federal employees: (1) claims brought “for a violation of the Constitution of the United States;” or (2) claims brought “for a violation of a statute of the United States.” 28 U.S.C. § 2679(b)(2). All other claims against federal employees based upon conduct undertaken within the scope of federal employment are barred by the Act. *See, e.g., Smith*, 499 U.S. at 166-67 (refusing to infer another exception beyond the two expressly stated in the Westfall Act). Neither exception applies to Count III, as it is a claim for damages under California state law. *See Rodriguez v. Kwok*, No. C13-04976SI, 2014 WL 889570 at *4 (N.D. Cal. March 3, 2014) (“The FTCA applies to state constitutional tort claims against a federal employee.”) (citing *Papa v. United States*, 281 F.3d 1004, 1010 n. 20 (9th Cir. 2002)).

II. THE INDIVIDUAL DEFENDANTS WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT

To determine whether a federal employee was acting within the scope of his or her employment, a federal court must apply the law of the state where the tortious act occurred. *See Clamor v. United States*, 240 F.3d 1215, 1217 (9th Cir. 2001) (“In reviewing a scope of employment determination under the FTCA, we look to the principles of respondeat superior as articulated in the law of the place where the alleged tort occurred.”); *McLachlan v. Bell*, 261 F.3d 908, 911 (9th Cir. 2001)

1 (California law controls the scope of employment issue, because the complained of conduct occurred in
2 California); *see also Pauly v. U.S. Dept. of Agriculture*, 348 F.3d 1143, 1151 (9th Cir. 2003); *Billings*,
3 57 F.3d at 800. Count III arises out of the issuance of the WePay subpoena, which was issued by an
4 Assistant United States Attorney in Texas in relation to a criminal prosecution taking place in Texas.
5 Thus, Texas principles of respondeat superior are applicable here.

6 “Under the theory of respondeat superior, . . . an employer may be vicariously liable for the
7 negligent acts of its employee if the employee’s actions are within the course and scope of his
8 employment.” *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 757 (Tex.2007). To find that
9 the employee acted within the scope of employment, “the conduct must be of the same general nature as
10 that authorized or incidental to the conduct authorized.” *Minyard Food Stores, Inc. v. Goodman*, 80
11 S.W.3d 573, 577 (Tex.2002) (quoting *Smith v. M Sys. Food Stores, Inc.*, 156 Tex. 484, 297 S.W.2d 112,
12 114 (1957)). *See also Laverie v. Wetherbe*, --- S.W.3d ---, 2017 WL 1301501 (Tex. 2017) (“traditional
13 scope-of-employment analysis in respondeat superior cases. . . concerns only whether the employee is
14 “discharging the duties generally assigned to her.”) (citing *City of Lancaster v. Chambers*, 883 S.W.2d
15 650, 658 (Tex. 1994)). “The scope-of-employment analysis, therefore, remains fundamentally
16 objective: Is there a connection between the employee’s job duties and the alleged tortious conduct? The
17 answer may be yes even if the employee performs negligently or is motivated by ulterior motives or
18 personal animus so long as the conduct itself was pursuant to her job responsibilities.” *Laverie*, ---
19 S.W.3d ---, 2017 WL 1301501 at * 3 (citation omitted). Furthermore, an employer is liable for the
20 foreseeable intentional and malicious acts of its employees done within the scope of employment, even
21 if not authorized. *Houston Transit Co. v. Felder*, 208 S.W.2d 880, 881 (Tex. 1948).

22 The issuance of a trial subpoena in connection to an on-going criminal prosecution is
23 undoubtedly something that Federal prosecutors are authorized to do by their employer, the United
24 States Government. The same is true, of course, with an FBI agent conducting an investigation. Indeed,
25 the plaintiffs do not allege otherwise in the Complaint. As *Laverie* instructs, the plaintiffs’ allegations
26 impugning the motives of the individual defendants does not remove the conduct from the scope of
27 employment, nor do the allegations questioning the relevance of the sought-after information to Mr.

Brown's prosecution. The sole question is whether the conduct at issue is of the general nature of their duties. The obvious answer is, yes.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Honorable Court grant its Motion for Substitution.

Date: May 11, 2017

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRIAN J. STRETCH
United States Attorney
Northern District of California

JAMES G. TOUHEY, JR.
Director, Torts Branch
Civil Division

STEPHEN E. HANDLER
Senior Trial Counsel
E-mail: stephen.handler@usdoj.gov
U.S. Department of Justice
Civil Division, Torts Branch
1331 Pennsylvania Ave., NW
Room 8080N
Washington, DC 20004
Telephone: (202) 616-4279
Facsimile: (202) 616-5200

/s/ Philip D. MacWilliams
PHILIP D. MACWILLIAMS
Trial Attorney
E-mail: phil.macwilliams@usdoj.gov
U.S. Department of Justice
Civil Division, Torts Branch
1331 Pennsylvania Ave., NW
Room 8080N
Washington, DC 20004
Telephone: (202) 616-4285
Facsimile: (202) 616-5200

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2017, I caused to be served upon the following counsel a true and correct copy of the United States' Motion to Substitute via ECF filing:

Charles S. Donovan

Guylyn R. Cummins

Eric J. DiIulio

Sheppard, Mullin, Richter & Hampton LLP

Four Embarcadero Center, 17th Floor

San Francisco, CA 94111-4109

Telephone: (415)-434-9100

/s/ Philip D. MacWilliams
PHILIP D. MACWILLIAMS

[PROPOSED] ORDER

Having considered Defendant United States' Motion to Substitute, and any opposition, reply, and oral argument presented, it is ORDERED that the United States is substituted for Defendants Heath and Smith with respect to the third claim for relief (Count III) of the Complaint (Dkt. # 1), and Defendants Heath and Smith are dismissed WITH PREJUDICE from the third claim for relief (Count III) of the Complaint.

IT IS SO ORDERED.

Dated: _____

MARIA-ELENA JAMES
UNITED STATES MAGISTRATE JUDGE

EXHIBIT A

CHAD A. READLER
Acting Assistant Attorney General
Civil Division
JAMES G. TOUHEY, JR.
Director, Torts Branch
STEPHEN E. HANDLER
Senior Trial Counsel
PHILIP MACWILLIAMS
Trial Attorney
P.O. Box 888
Benjamin Franklin Station
Washington, DC 20004
Telephone: (202) 616-4279
Facsimile: (202) 616-5200
Email: stephen.handler@usdoj.gov
phil.macwilliams@usdoj.gov

Attorneys for the United States of America

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Kevin Gallagher, on behalf of himself; and
Donor No. 1, individually and on behalf of all
anonymous donors to Free Barrett Brown,

Plaintiffs,

v.

United States; Candina Heath; Robert Smith;
Does 1-10,

Defendants.

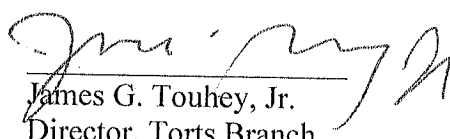
Case No. 3:17-cv-00586-MEJ

CERTIFICATION OF CANDINA
HEATH AND ROBERT SMITH
PURSUANT TO 28 U.S.C. §2679(d)(1)

I, James G. Touhey, Jr., Director, Torts Branch, Civil Division, United States Department of Justice, acting pursuant to the provisions of 28 U.S.C. §2679(d)(1), and by virtue of the authority vested in me by the Appendix to 28 C.F.R. §15.3 (Civil Division Directive No. 90-79), hereby certify that I have read the Complaint in *Kevin Gallagher, et al. v. United States, et al.*, No. 3:17-cv-00586 (MEJ) (N.D. Calif.). On the basis of the information now available with respect to the allegations, I certify that Candina Heath and Robert Smith were acting within the

1 scope of their employment as employees of the United States at the time of the conduct alleged
2 in the Complaint.

3
4
5 Dated: 5/11/17

6
7
8 
9 James G. Touhey, Jr.
10 Director, Torts Branch
11 Civil Division
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28